Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint") hereby respectfully submits its comments on the *Notice of Proposed Rulemaking* ("*NPRM*"), FCC 96-460, released November 27, 1996 in the above-captioned proceeding.

I. INTRODUCTION

Sprint generally supports the amendments being proposed by the Commission to its formal complaint rules. Although Sprint suggests herein a few modifications to the new rules, it believes that, for the most part, the proposed changes are long overdue. Indeed, the fact that the Commission intends to "require greater diligence by complainants ... in presenting claims of misconduct," *NPRM* at ¶23, is a welcome development and should reduce, if not eliminate, the frivolous complaints which are now

being filed against carriers such as Sprint.[1] It should also reduce, if not eliminate, the practice by certain complainants of filing what amounts to notice complaints and then attempting to use discovery to gather evidence to substantiate their "bare bones" allegations.[2]

Nevertheless, the act of "eliminating or streamlining procedures and pleading requirements under [the Commission's] current rules" will not, in and of itself, result in "faster resolution of all formal complaints." *Id.* at ¶2. At most, the proposed amendments will put the Commission in the position to

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[1] Sprint has been sued by individuals seeking damages even though Sprint had no direct business relationship with such individuals. *See, e.g., AMC v. Sprint,* 8 FCC Rcd 5522 (1993), *aff'd sub nom. AMC v. FCC,* 50 F.3rd 35 (D.C. Cir. 1995); *WATS International Corporation v. Group Long Distance (USA), Inc., National Independent Carrier Exchange, James J. McKeeff and Sprint Communications Company L.P.,* 11 FCC Rcd 3720 (1995). In each instance, Sprint was simply the underlying carrier of a reseller which, in turn, supplied services or had a business relationship with the complainant. Damages were perhaps being sought from Sprint because such resale carriers were on the verge of bankruptcy and may have been judgment proof.

[2] *See. e.g., Erdman v. Sprint,* File No. E-94-20 (In a case which was originally brought in the United States District Court for the Southern District of New York and later referred to Commission on primary jurisdiction grounds, complainant simply filed the same notice complaint with the Commission as it had filed in district court and such complaint did not allege any violation of the Communications Act by Sprint); *Interdec v. Sprint,* File No. 92-92 (Complainant accused Sprint of violating Section 202(a) of the Act in enforcement of challenged tariff provision, but presented absolutely no documentation to support such claim); *Ascom v. Sprint,* File No. 94-73 (Complainant set forth a number of allegations of unlawful conduct against Sprint which it claimed to be factual but for which it admitted it had no supporting documentation).

resolve complaints more rapidly. Ultimately, the Commission itself has the responsibility to ensure that the tight deadlines for resolving complaints which have been prescribed by the Telecommunications Act of 1996 are met by promptly ruling on the various motions filed by the parties and by quickly dismissing frivolous complaints or deciding complaints on their merits. The Commission will obviously be unable to fulfill its statutory mandate -- no matter what rules it adopts here -- if it fails to guard against procedural strategies designed to accomplish delay or if it fails to decide matters promptly. *See, e.g., AMC v. Sprint* (complainant allowed to continue to pursue its case against Sprint despite the fact that it did not oppose Sprint's motion to dismiss); *Erdman v. Sprint* (complainant allowed three attempts extending over a two year period to file a complaint which sought to tie the events complained of to a violation of the Act); and, *Sprint v. AT&T,* File No E-89-275 (the Commission has yet to issue a decision even though the briefing cycle closed in April 1991).[3]

[3] Of special concern, the Commission must act expeditiously and must not allow delay in the processing of complaints against a Bell Operating Company (BOC) if and when the BOC is permitted to enter the in-region interLATA market. Not only must BOC competitors have confidence that they will be able to secure relief promptly from the Commission, but the BOCs must be made aware that any anti-competitive actions will be dealt with swiftly. Otherwise, the pro-competitive goals of the 1996 Act will be difficult, if not impossible, to achieve.

As stated, Sprint believes that, for the most part, the amendments to the formal complaint rules which are being proposed in this proceeding are necessary if the Commission is determined to resolve complaints more rapidly. At the very least, they will expedite the formal complaint process and thereby put the Commission in a position to decide complaints with a minimum of delay. Thus, subject to the modifications and clarifications discussed below, Sprint supports adoption of the amendments.

II. DISCUSSION

A. Pre-filing Procedures And Activities (¶¶27-29)

Perhaps the most novel of the Commission's proposed amendments is the requirement that a "complainant, as part of its complaint, certify that it discussed, or attempted to discuss, the possibility of a good faith settlement with the defendant carrier's representative(s) prior to filing the complaint." *NPRM* at ¶28. If a complainant fails "to comply with this certification requirement," its complaint will be dismissed. *Id.* The Commission states that "discussions between potential complainants and defendants may promote settlements and "decrease the number of complaints filed with the Commission." *Id.* at ¶27. Such discussions may, according to the Commission, also serve to "narrow the scope of the issues in such complaints" and perhaps "facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission." *Id.*

Sprint does not take issue with the Commission's view that discussions between a potential complainant and defendant prior to filing a complaint may encourage the parties to settle the complaint or, at least, narrow the scope to the dispute. Nevertheless, Sprint is concerned that the requirement for pre-filing settlement discussions may lead to further disputes or provide a vehicle for the defendant carrier to delay the filing of a complaint.

Although the proposed rule simply states that the parties must have discussed the "possibility of settlement," §1.721(a)(8), in the text of the *NPRM* the Commission states that such discussions must involve a "good faith settlement." *NPRM* at ¶28. The Commission does not explain what is meant by a "good faith settlement" and the vagueness of the term may result in further disputes. For example, a defendant may argue that a complainant that refuses to accept less than the relief it intends to seek from the Commission has failed to discuss a "good faith settlement." Conversely, a complainant may claim that a defendant's offer of a *de minimis* payment to the complainant in order to avoid the costs of litigation or refusal to pay any money at all constitutes "bad faith."

Clearly, complainants and defendants are fully aware of the opportunity for settlement prior to the filing of a complaint. Even after the complaint has been filed, it has been Sprint's experience that the staff will very quickly explore settlement

possibilities with the parties. But the inability of the complainant or defendant to reach a settlement should not used to challenge the "good faith" of either party. Thus, if the Commission decides to adopt its proposal to require pre-filing settlement discussions between potential complainants and defendants, it must clarify that the failure of such discussions to achieve settlement will not be allowed to become an issue in the ensuing complaint proceeding.

Similarly, the Commission must ensure that any pre-filing requirement for settlement discussions which it adopts herein not delay the ability of a complainant to obtain prompt relief from the Commission, especially if the complaint against a BOC is brought under §271(d)(6). The issues involved in a complaint may be complex and require that the complainant and defendant engage in extended discussions just to understand such complexities, let alone to determine whether a settlement can be reached. Even if the issues are not difficult to understand, the requirement for a pre-filing settlement discussion may enable a defendant carrier to delay the filing of a complaint.[4] The filing of the

[4] There are a number of ways in which a defendant carrier may be able to exploit the requirement for pre-filing settlement discussions to delay the filing of a complaint. For example, the defendant may agree to, but then postpone, a meeting because the defendant's employees who should be at the meeting were unable to attend. Another ploy might be to fail to bring the employees who are best able to understand the issues in dispute to the initial meeting, thereby making future meetings necessary.

complaint and triggering the start of the statutory time period in which the Commission must render a decision may induce a recalcitrant defendant to abandon a strategy of delay and more seriously explore the possibility of settlement.

For these reasons, Sprint recommends that any rule providing for pre-filing settlement discussions allow the complainant the discretion to file its complaint within a reasonable period -- no more than 5 business days -- after informing the defendant of the potential complaint and offering to discuss settlement. Such discussions would not have had to have actually been held -- nor, for that matter, terminated -- before the complainant exercised its discretion in this regard. And, the complaint would not be subject to dismissal on grounds that complainant failed to fully explore the possibility of settlement with defendant.

B. Discovery (¶¶48-56)

The Commission observes that "discovery has been the most contentious and protracted component of the formal complaint process." *NPRM* at ¶49. Sprint agrees. Allowing for self-executing discovery as a matter of right has in many cases led to impasse and such impasse has, in turn, led to the filing of motions to compel by complainants; oppositions to such motions by defendants; and, sometimes the intervention of the Commission staff to resolve the disputes.

Plainly, the delays caused by controversies that have arisen under the current self-executing discovery rules can not continue

if the Commission is to meet the statutory deadlines established by the Act. But it is also critical to preserve the ability of a complainant and defendant in a complaint proceeding to obtain relevant materials from each another so that they will have a full opportunity to fully document their respective positions. While a complainant and defendant would still have "to present full legal and factual support for their respective claims in their complaints, answers and associated pleadings," NPRM at ¶50, they may need to supplement such support with evidence which is only in the possession of the other.

Sprint believes that the key to minimizing delay and preserving the right to discovery is to have the Commission staff rule on discovery requests at an early stage in the complaint process rather than after the controversy and concomitant delay have developed. Thus, Sprint suggests that the complainant and defendant in a complaint proceeding be required to submit their respective requests for discovery to the Commission within a short period after the defendant's answer is filed (*e.g.*, five days). Each party would then have to submit any written objections to providing such discovery prior to the initial status conference and at such conference the staff would then grant or deny the discovery requests, in whole or in part.[5]

[5] Such discovery requests may be in the form of interrogatories, requests for documents or a combination of both. However, as the Commission recognizes, it would have to limit the scope of

Footnote continues on next page.

By truncating the discovery process in this fashion the benefits of discovery can be maintained while minimizing delay.[6]

C. Briefs (¶81)

Sprint does not believe briefs should be eliminated in cases where discovery is not conducted. The Commission states that adoption of this proposal would "require parties to include proposed findings of fact, conclusions of law, and legal analysis with their complaints and answers." *NPRM* at ¶81. But it is unreasonable to expect the complainant to submit such information and argument prior to reviewing the defendant's answer. Indeed,

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discovery to deter the use of the discovery process by parties "for purposes of delay or to gain tactical leverage for settlement purposes." *NPRM* at ¶52. The Commission asks whether it should have the staff "determine what information needs to be supplied and to direct the party in possession to provide it for the record." *NPRM* at ¶50. The burden of developing a record in complaint proceeding should remain with the complainant and, to the extent that it raises affirmative defenses, with the defendant. The staff should not assume such burden. The Staff's responsibility in the discovery process is to determine whether a particular interrogatory or request for document by the complainant or defendant is relevant and not unduly burdensome to provide.

[6] The Commission's suggestion that the parties "stipulate that the losing party in the complaint proceeding would bear the reasonable costs associated with discovery, including reasonable attorney's fees," *NPRM* at ¶54, has merit. Today discovery is costless to the party requesting the information and thus such party often seeks information which it should already have in its possession prior to bringing the complaint, *e.g.*, billing records. If a party knew that it could be responsible for the costs of discovery efforts, it may be less inclined to abuse the discovery process in this way. Moreover, such responsibility for costs may help to focus the party's mind on seeking only essential information.

the complainant might seek discovery in light of such answer. It is also unreasonable to expect that the defendant prepare and submit what amounts to a brief with its answer given the relatively short period of time such defendants will have to file an answer. If discovery is not requested in a particular case, the Commission can set a short briefing schedule at the initial status conference.

III. CONCLUSION

As stated, Sprint supports most of the reforms suggested by the Commission in the *NPRM*. Sprint's suggested changes are designed to strengthen such reforms and help ensure that the Commission's goal of facilitating faster resolution of all complaints. Thus Sprint respectfully urges adoption of the proposes reforms as modified above.

Respectfully submitted,

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January 6, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMMENTS OF SPRINT CORPORATION** was sent by hand or by United States first-class mail, postage prepaid, on this the 6th day of January, 1997 to the below-listed parties:

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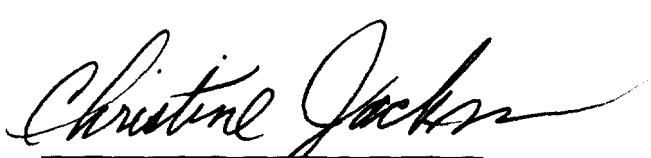

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